

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

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BILL: PCS/SB 1662

INTRODUCER: Governmental Oversight and Accountability Committee and Banking and Insurance Committee

SUBJECT: OGSR/Self-Insurers Guaranty Association

DATE: April 9, 2010                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Burgess</u>	<u>BI</u>	<b>Favorable</b>
2.	<u>Naf</u>	<u>Wilson</u>	<u>GO</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill is the result of an Open Government Sunset Review by the Senate Banking and Insurance Committee of public-records and public-meetings exemptions relating to the Florida Self-Insurers Guaranty Association, Inc. These exemptions will expire on October 2, 2010, unless reviewed and saved from repeal by the Legislature. This bill reenacts the exemptions and reorganizes the public-meetings exemption for clarity.

This bill substantially amends the following section of the Florida Statutes: 440.3851.

**II. Present Situation:**

**Florida's Public Records Laws**

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

access to public records to a constitutional level.<sup>2</sup> Article I, s. 24 of the State Constitution, provides that:

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which predates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency. Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency records are available for public inspection. The term “public record” is broadly defined to mean:

. . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.<sup>4</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.<sup>5</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>6</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>7</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to

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<sup>2</sup> Article I, s. 24 of the State Constitution.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> Section 119.011(11), F.S.

<sup>5</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>6</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>7</sup> Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.<sup>8</sup> A bill enacting an exemption<sup>9</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>10</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>11</sup> If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.<sup>12</sup>

### Public Meetings

The “Sunshine Law” was first enacted in 1967.<sup>13</sup> As codified in s. 286.011, F.S., the provision states:

- (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.
- (2) The minutes of a meeting of any such board or commission or any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

In effect, the Sunshine Law requires:

1. Meetings of public boards or commissions to be open to the public;
2. Reasonable notice for meetings; and
3. Minutes to be taken.

In 1992, the electorate approved an amendment to the State Constitution that raised the statutory requirement of open meetings to a constitutional mandate. Article I, s. 24(b) of the State Constitution provides:

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<sup>8</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

<sup>9</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>10</sup> Art. I, s. 24(c) of the State Constitution.

<sup>11</sup> Attorney General Opinion 85-62.

<sup>12</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>13</sup> Section 1, ch. 67-356, L.O.F.

All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article II, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

Collegial bodies within the state, including state and local bodies, are subject to open-meeting requirements, whether the members are appointed or elected.<sup>14</sup> Further, advisory boards without the authority to take action or to bind a decision-making entity, must comply with open-meeting requirements.<sup>15</sup> Fact-finding committees that function solely to find facts and to report them, however, have an exception under open meetings requirements.<sup>16</sup>

Given the increasing reliance of government upon legislatively-created corporations, as well as private service-providers, to perform governmental services, the applicability of open meetings requirements to these entities may arise. The judiciary has found that the Sunshine Law is to be construed liberally in order to give the full effect of its purpose.<sup>17</sup> The Sunshine Law has been held to apply to private entities created by law or a public agency. It also applies to private entities that provide services to governmental agencies on behalf of those agencies in the performance of their public duties. Generally, a private organization is not subject to the Sunshine Law unless it has been delegated the authority to perform a governmental function.<sup>18</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>19</sup> provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

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<sup>14</sup> *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971).

<sup>15</sup> *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974); *Accord, Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So.2d 694 (Fla. 3d DCA 1988); *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So.2d 857, 869 (Fla. 3d DCA 1994); *Lyon v. Lake County*, 765 So.2d 785 (Fla. 5th DCA 2000).

<sup>16</sup> *Cape Publications, Inc. v. City of Palm Bay*, 473 So.2d 222 (Fla. 5th DCA 1985).

<sup>17</sup> *Wood v. Marston*, 442 So.2d 934 (Fla. 1983); *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969).

<sup>18</sup> See, e.g., Inf. Op. to Fasano, June 7, 1996, where the Attorney General opined that the Sunshine Law does not apply to meetings of a homeowners' association board.

<sup>19</sup> Section 119.15, F.S.

- allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>20</sup>

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>21</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

### **Florida Self-Insurers Guaranty Association**

The Florida Legislature created the Florida Self-Insurers Guaranty Association (association) as a nonprofit corporation.<sup>22</sup> The purpose of the association is to provide a mechanism to fund covered workers' compensation claims of individual insolvent self-insurers other than public utilities or governmental entities. The association is under the general oversight of the

<sup>20</sup> Section 119.15(4)(b), F.S.

<sup>21</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

<sup>22</sup> Section 440.385(1)(a), F.S.

Department of Financial Services, which also regulates individual self-insurers for purposes of workers' compensation coverage.<sup>23</sup>

### **Exemptions Under Review**

Current law provides a public-records exemption for the association. Claims files and medical records and information relating to the medical condition or medical status of a claimant are confidential and exempt<sup>24</sup> from public-records requirements.<sup>25</sup> The public-records exemption for claims files expires upon termination of all litigation and settlement of all claims arising out of the accident.<sup>26</sup>

Upon written request, confidential and exempt claims files and medical records and other medical information, of a claimant, may be released to another agency in the performance of that agency's official duties and responsibilities. The receiving agency must maintain the confidential and exempt status of such files, records, and information.<sup>27</sup>

Current law also provides a public-meetings exemption for those portions of association meetings wherein confidential and exempt claims files or other medical information about a claimant is discussed. All closed portions of meetings must be recorded and transcribed, including:

- The times of commencement and termination of the meeting;
- All discussion and proceedings;
- The names of all persons present at any time; and
- The names of all persons speaking.<sup>28</sup>

Minutes of closed portions of association meetings are confidential and exempt from public records requirements; however, such exemption expires upon termination of all litigation and settlement of all claims.<sup>29</sup>

The court reporter's notes of any exempt portion of a meeting must be retained by the association for a minimum of five years.<sup>30</sup>

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2010, unless reenacted by the Legislature.<sup>31</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991) If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See Attorney General Opinion 85-62*, August 1, 1985).

<sup>25</sup> Section 440.3851(1)(a) and (b), F.S.

<sup>26</sup> Section 440.3851(1)(a), F.S.

<sup>27</sup> Section 440.3851(2), F.S.

<sup>28</sup> Section 440.3851(3), F.S.

<sup>29</sup> Section 440.3851(1)(c) and (3), F.S.

<sup>30</sup> Section 440.3851(3), F.S.

**III. Effect of Proposed Changes:**

The bill reenacts the public-records and public-meetings exemptions provided under s. 440.3851, F.S., by deleting the repeal date.

The bill also reorganizes the public-meetings exemption into paragraphs for clarity.

The bill provides that this act will take effect on October 1, 2010.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

This bill retains, but does not expand, the existing public-records and public-meetings exemptions relating to the Florida Self-Insurers Guaranty Association. Therefore, a two-thirds vote of each house of the Legislature is not required for passage.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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<sup>31</sup> Section 440.3851(4), F.S.

**VIII. Additional Information:**

- A. **Proposed Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Proposed Committee Substitute and the prior version of the bill.)

**PCS by Governmental Oversight and Accountability on April 14, 2010:**

The proposed committee substitute differs from the bill in that it:

- Reorganizes the public-meetings exemption into paragraphs for clarity.

- B. **Amendments:**

None.